APPENDIX A

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 15, 1993.
Decided January 12, 1994.

Before

RICHARD D. CUDAHY, Circuit Judge.
JOEL M. FLAUM, Circuit Judge.
ILANA DIAMOND ROVNER, Circuit Judge.

No. 93-2417

PAUL GUZMAN,

Plaintiff-Appellant,

v.

HENRY HUDSON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 CV 8473—Charles P. Kocoras, Judge.

ORDER

Paul Guzman appeals from the dismissal of his complaint pursuant to Fed. R. Civ. P. 12(b)(6). The district court

found that Guzman had no liberty interest in being rehired as a deputy of the United States Marshal's Service following his voluntary resignation.

In 1983, Guzman began work as a deputy. On June 1, 1989, he resigned[1] for personal reasons. On November 13, 1990, he asked to be reinstated. On August 28, 1992, the United States Marshals Service wrote to Guzman informing him that he had been denied reinstatement.

Our review of the district court's dismissal under Rule 12(b)(6) is de novo; we apply the same standards as the district court. We assume the truth of the allegations, and draw all reasonable inferences in the plaintiff's favor. *Bowman v. City of Franklin*, 980 F.2d 1104, 1107 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2417 (1993). We will uphold the dismissal when it appears that plaintiff can prove no set of facts in support of the claims that would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). In a pro se case, we liberally construe plaintiff's allegations. *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1303 (1993).

An employee has a property interest in a tenured civil service position. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 1491-92, 84 L. Ed. 2d 494 (1985).[2] But voluntary employee actions, such as

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[1] There is no claim that the resignation was not voluntary. *Cf. Latham v. United States Postal Service*, 909 F.2d 500 (Fed. Cir. 1990) (issue concerned voluntariness of resignation).

[2] Guzman points out that his "tenure" results from the fact that he qualified for civil service status when he completed three years of substantial, continuous, credible service for career appointment. *See Hondros v. United States Civil Service Comm'n*, 720 F.2d 278, 281-82 (3d Cir. 1983) (explaining "career" status attained upon completion of three-year period of credible service).

resignation, do not invoke the procedures and rights that the Civil Service Reform Act mandate for adverse agency action that affects that property interest. *Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987).

Guzman does not allege any discrimination, nor does he allege that the failure to rehire him resulted in a stigmatism that deprived him of the opportunity to work in any capacity for the government. He is free to obtain alternative employment. *Paul v. Davis*, 424 U.S. 693, 709-10, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 575-76, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Instead, Guzman merely points to a policy statement of the United States Office of Personnel Management, which states that "[r]einstatements to positions which are required by law to be filled on a permanent basis are made with career tenure." That policy statement, however, expressly states that:

> "[r]einstatement is a privilege accorded in recognition of and on the basis of former service and is not a 'right' to which the former employee is entitled."

The policy statement provides no liberty or property right. Guzman had no legitimate claim of entitlement to reinstatement. *See Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 506 (1989).

Guzman also relies on a section of the Illinois Municipal Code (Ill. Rev. Stat. 1990, ch. 24, pars. 10-2.1-18; now 65 ILCS 5/10-2.1-18 (1993)) which merely states the type of civil service status to be granted to police officers and firefighters who are reinstated after having been displaced due to work force reductions. Even if the Illinois statute created an entitlement to reinstatement, that statute is clearly not relevant to the federal job Guzman seeks here. That statute applies to local government employees, not

federal employees. It concerns reduction in force cases, not voluntary resignation.

Guzman has failed to allege a protected property or liberty interest. The district court properly dismissed his complaint for failure to allege facts sufficiently setting forth an essential element of his constitutional claim.

For these reasons, the district court's decision is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 12, 1994

BEFORE:

Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 93-2417

PAUL GUZMAN,

Plaintiff-Appellant

v.

HENRY HUDSON, Director, United States Marshals Service,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 8473—Charles P. Kocoras, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

[Dated May 12, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

92 C 8473

PAUL GUZMAN,

Plaintiff,

v.

HENRY HUDSON, DIRECTOR, UNITED STATES MARSHALS SERVICE,

Defendant.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on defendant's motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion is granted.

BACKGROUND

Plaintiff, Paul Guzman ("Guzman"), brings the present action against defendant, Henry Hudson, Director of the United States Marshals Service ("Defendant"), seeking this Court to declare that the Defendant has violated his

liberty under the Due Process Clause of the Fourteenth Amendment of the United States Constitution through his "arbitrary, capricious, and unreasonable" denial of Guzman's reinstatement as a deputy of the United States Marshals Service.

As alleged, Guzman began his employment as a deputy with the United States Marshals Service in 1983 and continued that employment until June 1, 1989, when he resigned for personal reasons. Guzman allegedly had been rated a good performer. On November 13, 1990, Guzman forwarded a letter to the United States Marshals Service for the purpose of being reinstated. On August 28, 1992, Guzman received a letter from the United States Marshals Service informing him that he had been denied reinstatement as a Deputy U.S. Marshal. The copy of this letter, attached to the complaint, further stated that more than 12,000 applications had been received for a limited number of Deputy U.S. Marshal positions and that each reinstatement request was reviewed on a case-by-case basis.

Guzman alleges in his complaint that he qualifies for reinstatement based upon a policy statement of the United States Office of Personnel Management, entitled Information Concerning Reinstatement (the "Policy Statement"), also attached to the complaint. As alleged, pursuant to paragraphs 2 and 3 of the Policy Statement, Guzman has qualified for "civil service status" by completing three years of substantial, continuous, credible service for career appointment, with the result that he has unlimited time for eligibility for reinstatement. It is also alleged that the United States Marshals Service has hired individuals lacking in Guzman's prior civil service status.

Guzman's complaint asserts that the Defendant's decision to deny reconsideration of his application for reinstatement has deprived him of his constitutionally protected

"liberty to pursue his occupation of being reinstated as a deputy with the United States Marshals Service."

Defendant brings the present motion to dismiss under Rule 12(b)(6), arguing that Guzman cannot prevail on his constitutional claim as a matter of law. The Court will discuss the parties' contentions below, but we will first set forth the appropriate legal standard by which to judge the present motion.

LEGAL STANDARD

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted since, in ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff. *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987). All well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Id.* The allegations of a complaint should be construed liberally and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986). However, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *Conley*, 355 U.S. at 41. We turn to the motion before us with these principles in mind.

DISCUSSION

As an initial matter, we grant Guzman's request to amend his complaint in order to base his due process claim on the Fifth Amendment of the Constitution, rather than on the Fourteenth Amendment as alleged in his complaint. Fed. R. Civ. P. 15(a). We find, nonetheless, that Guzman's claim under the Fifth Amendment cannot withstand Defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

The Due Process Clause of the Fifth Amendment prohibits the government from depriving any person of "life, liberty, or property, without due process of law." Guzman argues that Defendant's decision not to rehire him as "arbitrary, capricious, and unreasonable," based upon Guzman's belief that the individuals hired by Defendant were lacking in civil service status comparable to his own. We find, however, that a particular hiring decision, even if incorrect or ill-advised, does not automatically constitute an impairment of a constitutionally protected interest in liberty. *Bishop v. Wood*, 426 U.S. 341, 349 (1976). "[T]here can be no claim of a denial of due process, either substantive or procedural, absent deprivation of either a liberty or property right." *Eichman v. Indiana State Univ. Bd. of Trustees*, 597 F.2d 1104, 1109 (7th Cir. 1979). Thus, Guzman cannot prevail in this suit without first demonstrating that he has a constitutionally protected liberty interest.

As stated by the Supreme Court, a protected liberty interest is not something that stems from unilateral expectations or desires; rather, it is an "entitlement." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (stating "an individual claiming a protected interest must have a legitimate claim of entitlement to it"). Yet, even upon construing the complaint's allegations in the light most favorable to Guzman, we determine that Guzman

does not have an entitlement to a job with the Marshals Service and can point to no law, regulation or policy which vests him with an unconditional right to be rehired upon demand. In fact, the very Policy Statement upon which he rests his claim expressly states, "Reinstatement is a *privilege* accorded in recognition of and on the basis of former service and is *not* a 'right' to which the former employee is entitled." *See* Complaint, Exhibit E (emphasis added).

Guzman attempts to circumvent the Policy Statement's clear characterization of reinstatement as a privilege and thereby not an entitlement by directing the Court to the last sentence in paragraph 11 of the Policy Statement, which states that "[r]einstatements to positions which are required by law to be filled on a permanent basis are made with career tenure." *See id.*, Exhibit E, ¶ 11. On the basis of this sentence, Guzman argues that he has "career tenure" and, thus, has a "preference to reinstatement" analogous to that possessed by a furloughed public employee being recalled on the basis of seniority. According to Guzman, this purported "preference to reinstatement" comprises the basis of his protected liberty interest. We reject this argument on a number of grounds.

For one, Guzman's argument rests in large part upon a state statutory provision applicable to local governments, S.H.A. ch. 24, pars. 10-2.1-18 (Smith-Hurd 1990), not a federal law governing employees of the United States government as the present case requires. In addition, this argument relies upon the noncompelling analogy between Guzman's situation, involving a voluntary resignation, and that of police officers and firefighters whose jobs have been displaced due to work force reductions. Above all, this sentence, when read in the context of the entire paragraph, simply specifies the type of civil service status that

will be recognized once an employee is reinstated; it does not create an unconditional right to be reinstated in the first place. Likewise, the Policy Statement, read in its entirety, contains no mandatory language creating any entitlement and, thereby, any protected liberty interest on which Guzman could state a constitutional claim. *See, e.g., id.* ¶ 7 ("All reinstatements are made subject to investigation").

Thus, even upon taking the complaint's allegations as true, we conclude that Guzman does not possess a "legitimate claim of entitlement" protected under the Due Process Clause; he has merely alleged a "unilateral" hope of reinstatement which fails to state a claim under the Constitution. *Thompson*, 490 U.S. at 460. "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Board of Regents v. Roth*, 408 U.S. 564, 575 (1972). We conclude, therefore, in view of Guzman's failure to allege a protected liberty interest, that his complaint fails to allege facts sufficiently setting forth an essential element of his constitutional claim. *Conley*, 355 U.S. at 41. We grant the Defendant's motion to dismiss accordingly.

CONCLUSION

For the foregoing reasons, this Court grants Defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: May 12, 1993

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Paul Guzman

v. Case Number: 92 C 8473

Henry Hudson, Director,
United States Marshals Service

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this cause of action is hereby dismissed. Plaintiff to take nothing. Judgment entered.

Date: May 12, 1993

H. STUART CUNNINGHAM
Clerk

/s/ _____
(By) Deputy Clerk